Supreme Court, U.S.
FILED

932029 MAY 31 1994

OFFICE OF THE CLERK

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

GENERAL TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NUMBER 5,

Petitioner,

v.

FORMOSA PLASTICS CORPORATION, LOUISIANA

Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RANDALL G. WELLS
ATTORNEY AT LAW
717 S. Foster Drive
Suite 240
Baton Rouge, La. 70806
(504) 927-3914

Attorney for the Petitioner

93 pp

QUESTIONS PRESENTED FOR REVIEW

1.

May a federal district court judge make a factual finding dispositive of the labor arbitration matter on review inconsistent with the same dispositive factual finding made by a labor arbitrator in arbitration?

2.

Did the federal courts below fail to follow extant decisional authority from this Court by failing to defer to the labor arbitrator's ruling?

LIST OF INTERESTED PARTIES

1. General TruckDrivers, Warehousemen and Helpers Local Union No. 5 ("Local 5") 1772 Dallas Drive Baton Rouge, Louisiana 70806

2. Formosa Plastics Corporation, Louisiana ("Formosa") P. O. Box 271 Baton Rouge, Louisiana 70821

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
LIST OF INTERESTED PARTIES	2
TABLE OF CONTENTS	2-3
TABLE OF AUTHORITIES	3
REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS DELIVERED IN THE COURTS AND IN ARBITRATION BELOW	4
STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED	5
STATUE INVOLVED IN THIS CASE	5-8
STATEMENT OF THE CASE	8-15

ARGUMENT 15-25

APPENDIX 26

TABLE OF AUTHORITIES

STATUTES — Page

28 U.S.C. § 2101 (c) 5

29 U.S.C. § 185 . . . . . .5-8, 14

CASES, UNITED STATES SUPREME COURT — Page

United Paperworkers Union v. Misco, Inc., 484 U.S. 29 (1987).....16, 17, 19, 20, 23, 24

United Steelworkers v. American Manufacturing Co., 363 U.S. 546 (1960).....16, 23

United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960).....16, 23

United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)....16, 23

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS AND IN ARBITRATION BELOW

Page

Denial of Rehearing in the Fifth Circuit 27-28

Decision in the Fifth Circuit...15 F. 3d 1079 (5th Cir. 1994) and.....29-31

Notice of Appeal from the District Court.....32-34

Ruling on Motion for New Trial in the District Court.....35-41

Judgment of the District Court.....42-43

Findings of Fact and Conclusions of Law from the District Court.....44-71

Ruling on Motion for Summary Judgment in the District Court.....72-77

Arbitrator's Denial of Rehearing.....78-81

Arbitrator's Decision and Award.....82-92

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The United States Court of Appeals for the Fifth Circuit affirmed on January 31, 1994 the district court's Judgment, for the reasons written by the district court. (Appendix, pgs. 29-31). On March 2, 1994, the Fifth Circuit denied rehearing in the matter. (Appendix, p. 27-28).

The statutory provisions from which this Court has jurisdiction to review the Judgment in question by Writ of Certiorari is 28 U.S.C. § 2101 (c).

STATUE INVOLVED IN THIS CASE

29 U.S.C. § 185 is the statue involved in the present case. It reads as follows:

§185 Suits by and against labor organizations

Venue, amount and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents

in the courts of the United States. Any money judgment against a labor organization a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of Process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.
June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

STATEMENT OF THE CASE

For time material herein, there was in force and effect a collective bargaining agreement between Local 5 and Formosa. The grievance and arbitration terms of the collective bargaining agreement required the parties to submit those grievances that they could not internally resolve to final and binding impartial third party arbitration.

Local 5 filed with Formosa on May

21, 1990 a grievance on behalf of employee Thomas Loper ("Loper"). The grievance essentially contented that Loper was being mis-classified in his job position and underpaid.

Resort to third party arbitration was thereafter held when the parties could not resolve the Loper grievance. Impartial third party Arbitrator John J. Maxwell ("Maxwell") was mutually selected to arbitrate the Loper grievance.

Arbitration was held on April 17, 1991.

Arbitrator Maxwell received into evidence several exhibits on behalf of Local 5 as well as an exhibit by Formosa. Live testimony from several witnesses was also presented. Arbitrator Maxwell made his Decision and

Award concerning the Loper grievance on June 6, 1991. (Appendix, pgs. 82-92). Arbitrator Maxwell found, as a finding of fact dispositive of the Loper arbitration, that a "past practice" existed concerning the wage and classification provisions of the collective bargaining agreement such that Formosa had violated the collective bargaining agreement pertaining to Loper's classification and wage rates by its not adhering to the past practice. (Appendix, pgs. 82-92).

Formosa requested that Arbitrator Maxwell rehear the case. Formosa's Motion was denied by Arbitrator Maxwell on July 10, 1991. (Appendix, pgs. 78-81).

Formosa refused to voluntarily comply with the Decision and Award.

Therefore, Local 5 filed a Complaint in the Middle District of Louisiana to enforce compliance with the Arbitrator's Decision and Award. This was on August 1, 1991.

Local 5 moved for Summary Judgment on May 29, 1992. All Joint Exhibits and Stipulations made between Local 5 and Formosa were submitted in support of Local 5's Motion. Formosa opposed the Motion.

Chief Judge John V. Parker of the Middle District denied Local 5's Motion for Summary Judgment. The Judge indicated in his Ruling that a trial must be held in the matter. (Appendix, pgs. 72-77). Trial was held on April 5, 1993.

The district court did not use any evidence from the April 5, 1993 trial in

its determination of Findings of Fact and Conclusions of Law. Rather, it used all the Joint Exhibits and Stipulations made by the parties and its own factual findings. (Appendix, pgs. 44-71).

The district court found as one of its factual findings that "all past practices" pertaining to the wages and classifications pertinent in the Loper arbitration were "clearly bargained away" by Local 5. The district court then went on to conclude, as a matter of law, that because there was no "past practice" on which the Arbitrator could base his Decision and Award, the Arbitrator was therefore outside of his arbitral jurisdiction to render the Decision and Award that he made. (Appendix, pgs. 44-71).

Local 5 moved for a new trial. The

district court was briefed concerning how it had illegally supplanted a determinative factual finding made by the Arbitrator with a dispositive factual finding of its own inconsistent with the facts found by the labor arbitrator. Because of such illegal fact finding, the district court was apprised of why it was legally wrong to conclude that the arbitrator was outside of his arbitral jurisdiction to rule as he did.

The district court denied Local 5's Motion for New Trial, for the reasons presented in its August 5, 1993 Ruling. (Appendix, pgs. 35-41).

On October 11, 1993, Local 5 appealed this matter to the United States Court of Appeals for the Fifth Circuit. The issue of the district

court's making a dispositive factual finding different from the labor arbitrator's finding, as well as the district court's holding that the labor arbitrator was outside of his arbitral jurisdiction to render the Decision and Award made herein, were argued to the Fifth Circuit.

On January 31, 1994 , the Fifth Circuit upheld the district court, for the reasons written by the district court. (Appendix, pgs. 29-31).

Local 5 moved on February 10, 1994 for a rehearing before the Fifth Circuit. Such was denied on March 2, 1994. (Appendix, p. 27-28).

The basis for federal jurisdiction in the district court was 29 U.S.C. § 185 (a) and (c). 29 U.S.C. § 185 is

reprinted supra at pages 5-8 of this Petition.

ARGUMENT

Local 5 respectfully submits that the Fifth Circuit allowed the district court to completely depart from the admonition found in United Paperworkers Union v. Misco, Inc., 484 U.S. 29 (1987), concerning factual findings made by a labor arbitrator. Because the factual finding made by the district court below was not only inconsistent with the labor arbitrator's factual finding on the same matter, but was also dispositive of the labor grievance, the district court impermissibly "re-arbitrated" the labor grievance instead of deferring to the labor arbitrator's award. The district court, with

approval by the Fifth Circuit, made the legal conclusion that the arbitrator was outside of his arbitral jurisdiction. Thus, on this basis, the courts purportedly justified their legal ruling that it did not have to defer to the labor arbitrator's Decision and Award. Such violates the "great deferral" standard established by this Court in the Steelworkers Trilogy. (United Steelworkers v. American Manufacturing Co., 363 U.S. 546 (1960); United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) and United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)).

Local 5 respectfully submits that this Court has the opportunity via this case to more fully expound on the warning found in the Misco opinion

concerning lower federal courts finding facts *different from* those found by the labor arbitrator. While the Misco decision primarily discusses the aspect of a labor arbitrator's decision ostensibly being in violation of public policy, this Court nevertheless instructed lower federal courts to accept facts found by labor arbitrators. Labor arbitrators have more opportunity to observe witnesses and to be more familiar with the particular industrial plant in question and its problems than does a federal court. 484 U.S. at 45.

Local 5 respectfully submits that in the present case, the district court, with approval from the Fifth Circuit, made a factual finding concerning a "past practice" diametrically opposite of the "past practice" factual finding

made by the labor arbitrator. The factual finding made by the labor arbitrator supported his conclusion that Formosa had violated the wage and classifications provisions of the extant collective bargaining agreement as such pertained to the labor grievance before him.

In the guise of legally reviewing the extant collective bargaining agreement to determine whether the arbitrator was within his arbitral jurisdiction to render the Decision and Award made herein, the district court Judge, with approval from the Fifth Circuit, made the factual finding that Local 5 had bargained away all past practices concerning the extant wage and classification provisions that applied to the Loper arbitration. (Appendix,

pgs. 44-71). Local 5 attempted to have the district court and the Court of Appeals correct their errors concerning the inconsistent factual finding which is dispositive of this case.

The Misco opinion seems to tersely direct the lower courts to accept facts found by the labor arbitrator. 484 U.S. at 45. Local 5 respectfully submits that the present case is the vehicle by which this Court may more fully articulate the legal standard for determination of what facts, other than the arbitrator's, a district court can utilize when it must rule on a case involving enforcement of a labor arbitrator's decision.

While the directive in Misco for lower federal courts to accept facts found by the arbitrator may appear to be

unambiguous, Local 5 respectfully submits that the district court absolutely circumvented Misco in its fact finding and legal conclusions reasoning. There was no evidence presented to the district court that all past practices pertaining to the wage and classification provision of the extant agreement were bargained away by Local 5. Some past practices may have been.

But, the district court supplied through its own ipse dixit logic that all past practices pertaining to wages and classifications were bargained away. And, Local 5 briefed the courts concerning how the past practice found by the labor arbitrator had survived and was applicable herein.

Local 5 submits that it is not

within the district court's legal province to make such sweeping factual/legal conclusions. Rather, the district court is to uphold the arbitrator's finding of fact if there is a basis to conclude that the collective bargaining agreement may be interpreted as the arbitrator construed it. There was a basis for upholding the Decision and Award herein.

In the present case, the evidence presented to the labor arbitrator proved that, to his satisfaction, a past practice still existed as such would be used to interpret a collective bargaining agreement pertaining to mis-classifing and underpaying one employee in a unique set of circumstances. The labor arbitrator found the past practice to exist, and that Formosa's failure to

abide by the past practice rendered it in violation of the wage and classification terms of the extant agreement.

The district court failed to attempt to determine that the arbitrator could have made the factual finding that the labor arbitrator did make that was dispositive of this case. And, the district court erred by wrapping its differing factual determination under the umbrella of its legal conclusion that because the past practice relied on by the arbitrator had been bargained away, then the arbitrator was outside of his arbitral jurisdiction to render the decision that he made.

Local 5 respectfully submits that if a district court is allowed to make factual findings inconsistent from those

found by a labor arbitrator, and which become the focal point for the legal conclusion that the arbitrator was unfaithful to his contractual duties such that the arbitration Decision and Award must be set aside, then each and every one of the thousands of labor arbitration cases that are arbitrated in the country every year are subject to judicial evisceration. A federal district court judge will now be allowed to "re-arbitrate" the case instead of following the deferral rules set forth in Misco and the Steelworkers Trilogy. If the standards of Misco and the Steelworkers Trilogy concerning enforcement of labor arbitration awards are not clear enough, which they apparently are not, then every company or union that losses an arbitration case

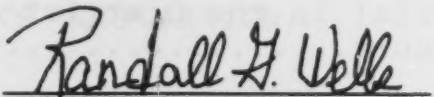
can still take its chances of having a federal court "re-arbitrate" the case instead of being bound by the "final and binding" terms of collective bargaining agreements.

Local 5 respectfully submits that this Court has the opportunity via the present case to revisit Misco and make further pronouncements for proper understanding of the role of the federal judiciary in enforcement of labor arbitration awards. Local 5

respectfully requests this Honorable Court to grant the present Petition for Certiorari.

RESPECTFULLY SUBMITTED:

RANDALL G. WELLS
717 S. Foster Drive
Suite 240
Baton Rouge, LA. 70806
(504) 927-3914

By: 

RANDALL G. WELLS
Counsel to Petitioner
General TruckDrivers,
Warehousemen and
Helpers Local Union
No. 5

APPENDIX

Page

Denial of Rehearing in the Fifth Circuit 27-28

Decision in the Fifth Circuit...15 F. 3d 1079 (5th Cir. 1994) and.....29-31

Notice of Appeal from the District Court.....32-34

Ruling on Motion for New Trial in the District Court.....35-41

Judgment of the District Court.....42-43

Findings of Fact and Conclusions of Law from the District Court.....44-71

Ruling on Motion for Summary Judgment in the District Court.....72-77

Arbitrator's Denial of Rehearing.....78-81

Arbitrator's Decision and Award.....82-92

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 93-3625

GENERAL TRUCKDRIVERS, WAREHOUSEMEN AND HELPERS LOCAL #5,

Plaintiff-Counter-Defendant-Appellant,

VERSUS

FORMOSA PLASTICS CORPORATION, LOUISIANA,

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

(91-CV-713-A-M1)

ON PETITION FOR REHEARING

(March 2, 1994)

Before DAVIS, EDITH H. JONES and DUHE, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

W. Eugene Davis
United States Circuit Judge

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3625
Summary Calendar

GENERAL TRUCKDRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 5,

Plaintiff-Counter-Defendant-Appellant,

VERSUS

FORMOSA PLASTICS CORPORATION, LOUISIANA,

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

(91-CV-713-A-M1)

Before DAVIS, JONES and DUHE, Circuit Judges.

PER CURIAM:1

General Truckdrivers, Warehousemen and Helpers Local Union No. 5 (the "Union") appeals the district court's order vacating the arbitrator's award and its later denial of the union's motion for new trial.

Based on our review of the record and for reasons assigned by the district court in its May 28, 1993 Findings of Fact and Conclusions of Law and its August 5, 1993 Ruling denying the Union's motion for new trial, we agree

---

1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on expense on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

with the district court that the arbitrator exceeded his jurisdictional authority under the collective bargaining agreements. We therefore affirm the district court's orders.

AFFIRMED.

U. S. Court of Appeals
FILED
JAN 31 1994
CHARLES R. FULBRUDGE III
CLERK

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GENERAL TRUCKDRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 5	CIVIL ACTION NO. 91-713-A
VERSUS	JUDGE: PARKER
BATON ROUGE PLANT OF FORMOSA PLASTICS CORPORATION, LOUISIANA	M. JUDGE: RIEDLINGER

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FROM A JUDGMENT AND ORDER FROM THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA

TO: Honorable Richard T. Martin
Clerk of Court
United States District Court
Middle District of Louisiana
707 Florida Boulevard
Baton Rouge, Louisiana 70802

and

Defendant Formosa Plastics Corporation, Louisiana
through its counsel of record
Murphy J. Foster, III, Esq.
Breazeale, Sachse & Wilson
P. O. Box 3197
Baton Rouge, La. 70821-3197

NOTICE IS HEREBY GIVEN that plaintiff General Truckdrivers, Warehousemen and Helpers Local Union No. 5, through undersigned counsel, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the following entered by the United States District Court, Middle District of Louisiana:

1. The Final Judgment entered in this action on June 7, 1993, and

2. The Ruling on Motion of New Trial entered in this matter on August 5, 1993.

Baton Rouge, Louisiana this 27th day of August, 1993.

BY ATTORNEY:

RANDALL G. WELLS
717 S. Foster Drive
Suite 240
Baton Rouge, La. 70806
Telephone: (504) 927-3914

BY: /s Randall G. Wells
RANDALL G. WELLS
Bar Roll No.: 13360
Counsel to Plaintiff
General Truckdrivers
Warehousemen and Helpers
Local Union No. 5

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice was mailed by first class mail, postage prepaid and properly addressed, to all counsel of record herein, this 27th day of August, 1993.

/s Randall G. Wells
RANDALL G. WELLS

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GENERAL TRUCKDRIVERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 5 CIVIL ACTION
VERSUS

NO. 91-713-A

BATON ROUGE PLANT OF
FORMOSA PLASTICS
CORPORATION, LOUISIANA

RULING ON MOTION FOR
NEW TRIAL

This matter is before the court on a motion by plaintiff, General Truck Drivers, Warehousemen and Helpers Union No. 5, for a new trial. Defendant, Formosa Plastics, has filed an opposition. There is no need for oral argument. Jurisdiction is allegedly based upon 29 USC §185(a) and (c).

On June 7, 1993, this court entered judgment in favor of defendant in this matter and dismissed plaintiff's suit. The judgment was based on a finding that

the arbitrator had exceeded his authority under the terms of the applicable collective bargaining agreements by awarding first class wages to Thomas Loper. In Findings of Fact and Conclusions of Law dated May 8, 1993, the court concluded that the arbitrator erred in relying on defendant's "past practices" to interpret the agreements. Although defendant may have formerly paid first class wages to first class skilled employees, the court found that [i]mplementation of the progressive pay system [in the 1986 agreement and continued in the 1989 agreement] represented a change from defendant's past practice of paying newly hired employees in accordance with the experience of level of skill possessed

when hired." Findings of Fact, para. 25. The court further found that the award of first class wages to Loper constituted a change of a wage rate that had been specifically agreed to by the parties and was arbitral action clearly prohibited by the written agreement. Conclusion of Law, para. 9.

Plaintiff makes several arguments in support of its motion. First, plaintiff claims that the court erred in finding that the arbitrator could not rely on past practice to resolve the Loper grievance. Second, plaintiff advances for the first time an argument that the agreement to which the arbitrator applied past practices was not the 1986 and 1989 written agreements containing the progressive wage schedules but rather a separate and

subsequent oral agreement between the parties in which they agreed that wages higher than those dictated in the written agreements could be paid to certain employees. It is plaintiff's position that the arbitrator had the authority to use past practices to resolve the dispute as to which employees were entitled to the higher wages agreed upon in the unwritten agreement. Plaintiff argues that the arbitrator was merely "filling in the gaps" of the unwritten agreement.

"A motion for a new trial in a nonjury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." Wright and Miller, Federal Practice and Procedure: Civil §2804 at 37.

With regard to plaintiff's first argument, the court finds that no error has been made. An arbitrator's reliance on past practices is an appropriate interpretive tool only when the written collective bargaining agreements contains gaps or is ambiguous. The agreements at issue contain no such gaps. Both are clear and unambiguous and establish the intent of the parties to do away with the very practice used by the arbitrator to award Loper first class wages.

With regard to plaintiff's new argument, plaintiff raises for the first time the notion that the arbitrator found the existence of a separate oral agreement between the parties in which they agreed to pay first class skilled employees more than wages listed in the

wage schedules of the written agreements. The arbitrator made no such finding. Neither do the stipulations of the parties indicate that evidence of a separate agreement was presented to the arbitrator during the arbitration proceedings. If the arbitrator had found such an agreement, this case would have involved entirely different issues.

Finally plaintiff refers to the court's observation that no transcript was made of the arbitration proceeding, which in turn, resulted in the court's refusal to consider any evidence of the arbitration other than the joint stipulations submitted by the parties. Plaintiff misconstrues this action by the court. It was not the court which attempted to reconstruct the arbitration

through testimony by the participants; rather, it was the parties themselves.

Accordingly, plaintiff's motion for a new trial is hereby DENIED.

Baton Rouge, Louisiana, August 5, 1993.

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GENERAL TRUCKDRIVERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 5

CIVIL ACTION

VERSUS

NO. 91-713-A

BATON ROUGE PLANT OF
FORMOSA PLASTICS
CORPORATION, LOUISIANA

J U D G M E N T

This cause came on before the court for trial, the Honorable John V. Parker, Chief Judge, presiding, and the Court having rendered its written Findings of Fact and Conclusions of Law,

IT IS ORDERED ADJUDGED AND DECREED that there be judgment entered herein in favor of defendant, Baton Rouge Plant of Formosa Plastics Corporation, Louisiana, and against plaintiff, General Truck Drivers, Warehousemen and Helpers, Local Union No. 5, dismissing plaintiff's suit

at plaintiff's costs.

Baton Rouge, Louisiana, June 7, 1993.

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GENERAL TRUCKDRIVERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 5

CIVIL ACTION

VERSUS

NO. 91-713-A

BATON ROUGE PLANT OF
FORMOSA PLASTICS
CORPORATION, LOUISIANA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was submitted following a nonjury trial held on April 5, 1993. After having carefully considered the evidence and the arguments of counsel, the court now renders its findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a).

FINDINGS OF FACT

A. In the pretrial order, the parties entered into the following stipulations of fact, which are quoted verbatim:

1. Arbitrator John J. Maxwell ("Maxwell") was jointly selected by Local 5 and Formosa to serve as impartial third party arbitrator concerning a grievance filed by Local 5 and on behalf of Thomas W. Loper ("Loper").

2. The Loper grievance was arbitrated before arbitrator Maxwell on April 17, 1991 (hereinafter "the arbitration").

3. Randall G. Wells ("Wells") represented Local 5 and Loper in the arbitration.

4. Murphy J. Foster , III ("Foster") represented Formosa in the arbitration.

5. Don McLean, Local 5 President and an employee of Formosa, and Loper, also a Formosa employee, testified on

behalf of Local 5 and Loper in the arbitration.

6. Patrick Loupe, Administrative Manager for Formosa, testified on behalf of Formosa in the arbitration.

7. The exhibits listed in Part VIII(A)1 along with the testimony from Don McLean, Thomas Loper and Patrick

---

1. Part VIII(A) of the Pretrial Order lists the following exhibits: (1) October 1, 1986 - September 30, 1989 collective bargaining agreement between Local 5 and Formosa; (2) October 1, 1989 - September 30, 1992 collective bargaining agreement between Local 5 and Formosa; (3) May 21, 1990 grievance files (sic) on Loper's behalf; (4) May 24, 1990 response by Formosa to the Loper grievance; (5) Highlights of Final Company Offer Implemented October 6, 1989; (6) Seniority Listing; (7) Hourly Employee Time Card Check List for Week Ending 3/17/91; (8) Certificate of Qualifications; (9) Hourly Shuttle Sheet; (10) Local 5's post-arbitration brief submitted to Arbitrator Maxwell; (11) Formosa's post-arbitration brief submitted to Arbitrator Maxwell.

Loupe, were presented to and utilized as evidence by Arbitrator Maxwell concerning Loper's grievance in the arbitration.

8. Arbitrator Maxwell rendered his Decision and Award on June 6, 1992 concerning the Loper grievance.

9. After Local 5 and Formosa each received Arbitrator Maxwell's Decision and Award, Formosa moved for Arbitrator Maxwell to rehear the Loper matter.

10. Soon after Formosa moved for the above mentioned rehearing, Local 5 opposed said motion.

11. Arbitrator Maxwell denied Formosa's Motion for Re-Hearing.

12. Loper's date of hire at Formosa was January 18, 1988, and his first work classification was that of an operator trainee.

13. When Loper first came to work for Formosa, he was paid the rate of $8.00 per hour as established in the Hourly Rate Schedule on page 53 of the agreement between Formosa and Local 5 dated October 1, 1986 through September 30, 1989.

14. It was established by the parties at the arbitration, as a matter of evidence, that since 1986 (the originating date of the previously signed contract) all newly hired operators had been brought in at the progressive pay rate set forth in the previous and existing collective bargaining contracts.

15. No person who testified at the arbitration on behalf of Local 5 was involved in contract negotiations during 1986 when the progressive rate system

was first introduced into the contract.

16. Don McLean, Local 5's representative, testified in the arbitration that Local 5 tried very hard during the 1989 negotiations to do away with the progressive pay system but they had failed.

17. Mr. McLean admitted signing the present collective bargaining contract ... with the progressive pay system set forth therein, though begrudgingly.

18. Local 5, prior to the grievance filed on May 21, 1990, never grieved about Loper's rate or any other operator's rate until they filed the grievance at issue in this proceeding.

19. Pat Loupe, the Company's personnel manager, was the only individual to testify at the proceedings who actually participated in the 1986

contract negotiations when the progressive rate system was originally established.

No record or transcript was made of the proceedings before the arbitrator except the joint stipulations listed above. Nevertheless both sides have offered evidence, including the testimony of the arbitrator, in an attempt to reconstruct the testimony presented. As the court explained at trial, there simply is no transcript of testimony and none can now be created. The court therefore disregards all evidence presented which attempts to reconstruct the testimony except the joint stipulations quoted above.

B. After carefully considering the evidence, the court renders the additional findings of fact:

20: Plaintiff, General Truck Drivers, Warehousemen and Helpers Union No. 5, is the collective bargaining representative for certain employees working at defendant's plant in Baton Rouge, Louisiana. Plaintiff is a "labor organization" as defined in the Labor Management Relations Act, 29 U.S.C. §141 et seq.

21. Defendant, Formosa Plastics Corporation, La., is a corporation authorized to do and doing business in the State of Louisiana. Defendant is an "employer" as defined in the Labor Management Relations Act, 29 U.S.C. §141 et seq.

22. Prior to October 1, 1986, plaintiff and defendant negotiated a collective bargaining agreement effective from October 1, 1986 through

September 30, 1989 (the 1986 agreement). The 1986 agreement contains the following two hourly labor rate schedules:

BATON ROUGE PLANT
HOURLY LABOR RATE SCHEDULE
FOR EMPLOYEES HIRED BEFORE 10/1/86

	Present Rate 10/1/86 Until 9/30/88*	Effective 10/1/88
I. PROCESS OPERATION		
Utility Operator	$14.49	$14.78
Operator 1-c	13.93	14.21
II. Maintenance	14.49	14.78
Field Mechanic 1-c	14.49	14.78
Machinist 1-c	14.49	14.78
Boiler Shop 1-c	14.49	14.78
Welder 1-c	14.49	14.78
CPIM 1-c	14.49	14.78
Instruments 1-c	14.49	14.78
Elec/Ref 1-c	14.49	14.78
Shift (Field) 1-c	14.49	14.78

Shift (Elec/Ref)		
1-c	14.49	14.78
Shift (Instr)		
1-c	14.49	14.78
Shift (Mach)		
1-c	14.49	14.78
III. MISCELLANEOUS & SPECIAL		
Chemical Route		
1-c	13.93	14.21

* 2% lump sum payment at the end of each quarter, based on regular straight time scheduled rate.

BATON ROUGE PLANT
HOURLY LABOR RATE SCHEDULE
FOR EMPLOYEES HIRED AFTER 10/1/86

Hire	$8.00
6 months	8.75
12 months	9.75
24 months	10.75
36 months	11.75

Fixed rate for the term of the contract

23. Prior to October 1, 1989, plaintiff and defendant negotiated a subsequent collective bargaining agreement effective from October 1, 1989 through September 30, 1992 (the 1989 agreement). In a document entitled

"HIGHLIGHTS OF FINAL COMPANY OFFER IMPLEMENTED OCTOBER 6, 1989", defendant explained that the "[t]wo tier pay system for new hires will be eliminated. A new 48 month training progression pay system will be established. All employees performing the same job after a 48 month training progression system is completed, will be paid equally."

24. The 1989 agreement includes the following wage schedule:

BATON ROUGE PLANT
HOURLY LABOR RATE SCHEDULE

I. Process Operations

	10/6/89	10/6/90	10/6/91
	.45/hr	.46/hr	.46/hr
Utility Operator	$15.23	$15.69	$16.15
Operator 1-C	$14.66	$15.12	$15.58
Operator 2-C	$14.09	$14.55	$15.01
Operator 3-C	$13.39	$13.85	$14.31

II. Maintenance

Mechanic 1-C		
$15.23	$15.69	$16.15
Machinist 1-C		
$15.23	$15.69	$16.15
Boiler Shop 1-C		
$15.23	$15.69	$16.15
Welder 1-C		
$15.23	$15.69	$16.15
CPIM 1-C		
$15.23	$15.69	$16.15
Instrument 1-C		
$15.23	$15.69	$16.15
Transportation 1-C		
$15.23	$15.69	$16.15
Garage Mechanic 1-C		
$15.23	$15.69	$16.15

III. Miscellaneous

Chemical Routine IC		
$14.66	$15.12	$15.58

IV. Progressive System

Hire		
$ 8.00	$ 8.00	$ 8.00
1 month		
$ 9.20	$ 9.66	$10.12
3 month		
$10.20	$10.66	$11.12
4 month		
$11.20	$11.66	$12.12
12 month		
$12.20	$12.66	$13.12
24 month		
$13.20	$13.66	$14.12

36 month	$14.20	$14.66	$15.12
48 month	Top Rate	Top Rate	Top Rate

25. The progressive wage schedule in the 1986 agreement and essentially continued in the 1989 agreement was a provision which was negotiated an agreed to by the parties. Implementation of the progressive pay system represented a change from defendant's "past practice" of paying newly hired employees in accordance with the experience or level of skill possessed when hired.

26. After discovering in 1990 that several skilled maintenance craftsman had been hired by defendant at a rate higher than the starting pay listed in the progressive wage schedule of the 1989 agreement, Loper notified plaintiff which then filed a grievance with

defendant on Loper's behalf.

27. The May 21, 1990 grievance letter addressed to Pat Loupe read:

Dear Sir:

I Thomas W. Loper would like to have my rate of pay increased to the rate of the job on which I am working. I would like this increase because there are people who were hired at a higher rate of pay than set down in the hourly rate schedule. These people were hired after the Hourly Labor Rate Schedule was set down on October 1, 1989.

Filed by Teamsters Committee Local 5 Formosa Plastics Baton Rouge, La. for Mr. Thomas W. Loper

/s Elton L. Lofton
/s Donald H. McLean
/s James Denman
/s Billy G. Ratcliff
/s Ronald W. Stewart

28. Essentially, plaintiff sought to have Loper's pay removed from the progressive pay schedule contained in the 1989 agreement and raised to "first class wages".

29. The grievance was denied by

defendant. The May 24, 1990 letter of denial addressed to the Negotiating Committee of Teamsters Local No. 5 read:

> Dear Sirs:
>
> The only employees hired at the rate of the job were in the Mechanical and M&I sections. These employees are skilled, qualified, experienced craftsmen who required no training to perform their craft. If management decides to bring in unskilled people and train them in a particular craft, they will enter in the progression system defined in the contract. All operators including Mr. Loper who require extensive training will follow the training program progression pay system.
>
> There was no violation of the agreement. This grievance is denied.
>
> /s Patrick L. Loupe
> Administrative Manager

30. As earlier noted, the matter was submitted to arbitration on April 17, 1991 before John J. Maxwell. The parties presented briefs, testimony, and exhibits for the arbitrator's consideration.

31. In his June 6, 1991 Decision and Award, the arbitrator found that prior to the implementation of the 1986 agreement, it was the practice of defendant to hire first class skilled workers, regardless of their job description (e.g., operators, maintenance personnel), at first class pay rather than according to any type of schedule.

32. Contrary to defendant's argument that the progressive pay schedules contained in the 1986 and 1989 agreements were meant to change this practice only with regard to all operators at defendant's plant, the arbitrator's decision states:

> We find nothing in this section [the 1986 and 1989 progressive pay schedules] which would limit its

application only to the operators hired by the Company. We find nothing in this section which would limit first class operators from receiving first class pay. We find nothing in this section of the Contract which says it does apply to the first class operators classifications. We find the contested language very vague and ambiguous and must look to equity to answer the dilemma.

33. The arbitrator concluded that Loper was a first class skilled operator when hired by defendant; that it was the past practice of defendant to hire first class operators at first class pay; that the progressive wage schedules contained in the 1986 and 1989 agreements contained no indication that first class operators should not be paid first class wages; and that, if other first class skilled employees were to be paid first class wages, then Loper should be paid at first class rates as well.

34. The arbitrator granted

plaintiff's request that Loper receive first class operator pay from the date of the filing of the grievance.

35. In his July 10, 1991 denial of defendant's application for a rehearing, the arbitrator summarized his earlier findings. In pertinent part, the decision read:

> When grievant [Loper] was employed there was contained in the October 1, 1986 to September 30, 1989 labor agreement on page 53 a Baton Rouge Plant Hourly Labor Rate Schedule for Employees hired after 10/1/86. Nowhere in the contract does it say that anyone is excluded or that it pertains to any particular class of employee. The company contends it applies only to all operators. It cannot apply to first class operators as well as operator trainees if there are two such classifications. Because the company [defendant] has acquiesced in the proof of first class status for Loper at the time of his employment we found the language at the bottom of pages 53 and 55 of the Labor agreements to apply only to operator trainees. The Company [defendant] in its motion for a

rehearing argues that no employee who is working for another company as an operator ... can be considered as a first class operator at Formosa's [defendant] chemical plant because the products, procedures and processes are entirely different. This is a fact which must be proven by the evidence. No such evidence was offered at the hearing on April 1, 1991. (emphasis added).

36. Following an unsuccessful demand by plaintiff that defendant comply with the arbitrator's decision, plaintiff filed this suit to enforce the arbitrator's decision and award. Defendant counterclaimed to have the decision set aside claiming that the arbitrator exceeded his authority under the terms of the 1989 agreement in awarding Loper first class operators wages.

37. The 1986 and 1989 agreements contain the following identical language with regard to the authority of the

arbitrator:

The decision of the arbitrator will be final and binding on all parties. The arbitrator shall have no jurisdiction or authority to:

(1). Add to, subtract from or modify or in any way change the provisions of this Agreement.

(2). Establish new wage schedule or change wage schedules or wages for a specific job classifications.

(3). Substitute his discretion for the Company's discretion in cases where the Company is given discretion by this Agreement.

(4). Determine standards of production or assume any other responsibility of management or the Union.

CONCLUSIONS OF LAW

1. The court has subject matter jurisdiction over this matter under the Labor Relations Management Act, 29 U.S.C. §185.

2. The scope of this court's review of the arbitrator's decision is

set forth in the Federal Arbitration Act, 9 U.S.C. §1 et seq. Under the terms of Section 10(a) of the Act, a district court, in and for the district wherein the award was made, may make an order vacating the award, upon the application of any party to the arbitration, when the arbitrator has exceeded the power given him in the applicable agreement.

3. An arbitrator's award will not be considered in excess of his authority "if his decision 'draws its essence from the collective bargaining agreement' and is not based on [his] 'own brand of industrial justice.' "E.I. DuPont de Nemours and Co. v. Local 900, 968 F.2d 456,458 (5th Cir. 1992) citing United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80

S.Ct. 1358,1361, 4 L.Ed. 2d 1424 (1960).

4. "However, federal courts are free to scrutinize the award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement." Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n., 889 F.2d. 599, 602 (5th Cir. 1989), cert. denied, 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). "Thus, while an arbitrator's decision is accorded considerable judicial deference to the extent it touches the merits of the controversy, his jurisdiction nevertheless is shaped by the underlying collective bargaining agreement." Id.

5. Reference to "past practices" and "negotiating history" is an appropriate means by which to resolve

ambiguities and gaps in written collective bargaining agreements. Manville Forest Prod. v. United Paperworkers Intern., 831 F.2d 72,76 (5th Cir. 1987). However, in this matter, the arbitrator's reliance on defendant's "past practices" is error. There are no gaps; the agreement is not silent. The negotiating history between the parties, which led to the inclusion of the progressive pay system in the 1986 and 1989 agreements, is clearly indicative of an intent to change the "past practices" relied upon by the arbitrator which existed prior to the agreements. Although defendant may have formerly "paid first class wages to first class skilled employees", this "past practice" was done away with by the implementation of the progressive

pay system in the 1986 agreement and continued in the 1989 agreement. Thus, the arbitrator exceeded his authority by relying on a past practice which was clearly "bargained away" in the negotiation of the 1986 and 1989 agreements.

6. The arbitrator further erred in concluding that the progressive wage schedules applied only to operator trainees, and therefore, not to first class skilled operators. The stipulated facts show that all operators hired since 1986 were paid according to the progressive wage schedules.

7. Although the schedules could reasonably be construed to apply to all newly hired employees, including maintenance personnel, there is no basis for concluding that they did not apply

to first class operators. Defendant may have violated the agreement by paying maintenance employees more than the rates listed in the progressive wage schedule of the 1989 agreement; however, it did not violate the agreement as to Loper. He was hired as an operator and was paid according to the progressive wage schedule just as had every other operator since the effective date of the 1986 agreement. Because Loper's grievance is the only matter before the court, the court cannot consider any other action by defendant which may have violated the agreement.

8. Despite the arbitrator's finding that Loper was "discriminated against" by defendant when paid less than other first class skilled employees, the arbitrator's resort to

"equity to resolve the dilemma" was improper. Although the arbitrator may have considered it unfair to subject first class operators to the progressive pay system while paying first class rates to first class maintenance workers he improperly substituted his own wage provisions into the agreement in place of those agreed upon by the parties. Such action constitutes a dispensation of the arbitrator's "own brand of industrial justice." E.I. DuPont de Nemours and Co., supra, 968 F.2d at 458.

9. Further evidence that the arbitrator exceeded his powers lies in the express terms of the agreement from which his authority derives. Section 42 of both agreement specifically states that "[t]he arbitrator shall have no jurisdiction or authority to ...

establish new wage schedules or change wages schedules or wages for specific job classifications." In deciding that Loper was entitled to first class pay because he was "indisputably qualified" as a first class skilled employee when hired, the arbitrator changed a wage rate that had been specifically agreed to by the parties and paid by defendant since 1986 without exception. This change of wages amounts to arbitral action which is clearly prohibited by the terms of Section 42. "[A]rbitral action contrary to express contractual provisions will not be respected." Delta Queen Steamboat Co., supra, 899 F.2d at 604.

10. "if the court finds that the arbitrator exceeded the arbitral authority laid out in the agreement,

then the district court's action vacating the award is appropriate." E.I. DuPont de Nemours and Co. v. Local 900, 968 F.2d 456,458 (5th Cir. 1992) (citations omitted).

Accordingly, since the court finds that the arbitrator exceeded the authority granted him by the agreements, the award in favor of Loper is hereby vacated, and judgment will be entered in favor of defendant and against plaintiff and this action will be dismissed.

Baton Rouge, Louisiana, May 28, 1993.

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GENERAL TRUCKDRIVERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 5

CIVIL ACTION

VERSUS

NO. 91-713-A

BATON ROUGE PLANT OF
FORMOSA PLASTICS
CORPORATION, LOUISIANA

RULING ON MOTION
FOR SUMMARY JUDGMENT

This matter is before the court on motion by plaintiff, General Truck Drivers, Warehousemen and Helpers Union No. 5, for summary judgment. Defendant, Formosa Plastics, has filed an opposition. There is no need for oral argument. Jurisdiction is allegedly based upon 29 USC §185 (a) and (c).

On January 18, 1988, Thomas W. Loper ("Loper") was hired by defendant as an operator trainee under the terms of a collective bargaining agreement

between plaintiff (the collective bargaining representative for certain employees of defendant) and defendant. The effective period of the agreement under which Loper was hired was October 1, 1986 through September 30, 1989.1 Under the terms of the progressive pay schedule found in the collective bargaining agreement, Loper was initially paid at a rate of eight dollars per hour.2 Additionally, the subsequently negotiated collective bargaining agreement effective October 1, 1989 through September 30, 1992 also

---

1. A copy of the 1986-1989 collective bargaining agreement is attached as Exhibit 1 to the "Joint Stipulations and Exhibits" filed by the parties.

2. Joint Stipulations and Exhibits, para. 15.

included a progressive pay schedule.[3]

After discovering in 1990 that several skilled maintenance craftsmen had been hired by defendant at a rate higher than that provided for in the progressive pay schedule of the 1989-1992 collective bargaining agreement, Loper notified plaintiff who filed a grievance on his behalf dated May 21, 1990 requesting that his rate of pay be increased to the rate of the job on which he was working.[4] Essentially, plaintiff sought to have Loper's pay removed from the progressive pay schedule and raised to the higher rate

---

3. A copy of the 1989-1992 collective bargaining agreement is attached as Exhibit 2 to the "Joint Stipulations and Exhibits" filed by the parties.

4. Joint Exhibit 3.

formerly paid first class operators.

The grievance was denied by defendant.

The matter was thereafter submitted to arbitration on April 17, 1991 before John J. Maxwell ("the arbitrator") - an arbitrator jointly chosen by the parties.

The arbitrator granted plaintiff's request that Loper receive first class operator pay from the date of the filing of the grievance (May 21, 1990).

Following an unsuccessful demand by plaintiff that defendant comply with the arbitrator's back pay award, plaintiff filed this suit to enforce the arbitrator's decision and award. Defendant counterclaimed to have the decision and award set aside. Plaintiff now moves for summary judgment

essentially arguing that because the arbitrator acted within his authority under the collective bargaining agreement by utilizing evidence of defendant's past practices, the court should defer to the arbitrator's decision.

In opposition, defendant argues that plaintiff is not entitled to summary judgment because [t]he arbitrator in this case clearly exceeded his authority by disregarding the clear terms of the contract and by ignoring the plain evidence of the parties' intent offered at the arbitration hearing.

The court has carefully reviewed all the briefs submitted, all the exhibits submitted and the award of the arbitration. No transcript was made of

the testimony presented before the arbitrator. Nevertheless, both sides submit affidavits in an attempt to construct a transcript. That cannot be done. There is no record of what testimony was presented beyond what may be contained in the words of the arbitrator.

On the merits, the court concludes that plaintiff has not clearly demonstrated that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law.

Accordingly, the motion for summary judgment on behalf of plaintiff is hereby DENIED.

Baton Rouge, La, January 5, 1993.

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPLICATION FOR RE-HEARING

IN THE

ARBITRATION

BETWEEN

Formosa Plastics Corporation

and

General Truck Drivers, Warehousemen
and Helpers Union NO. 5

Grievance of Thomas W. Loper

FMCS Case No. 90-20772

Hearing, April 17, 1991

Formosa Administrative Office
Baton Rouge, Louisiana

JOHN J. MAXWELL
Impartial Arbitrator

A hearing was held in this matter on April 17, 1991 at the Administration Building of Formosa Plastics in Baton Rouge, Louisiana.

At this hearing the Union presented clear and convincing evidence that the grievant was, at the time of his hiring, a first class operator. The Company offered absolutely no evidence to controvert this proof. Because of the failure of the Company to offer any evidence that the grievant was not a first class operator for Formosa's purposes and production the Arbitrator found that at the time of hiring the grievant was in fact a first class operator.

When grievant was employed there was contained in the October 1, 1986 to September 30, 1989 labor agreement on

page 53 a Baton Rouge Plant Hourly Labor Rate Schedule for Employees hired after 10/1/86. Nowhere in the contract does it say that anyone is excluded or that it pertains to any particular class of employee. The company contends it applies only to all operators. It cannot apply to first class operators as well as operator trainees if there are two such classifications. Because the company has acquiesced in the proof of first class status for Loper at the time of his employment we found the language at the bottom of pages 53 and 55 of the Labor agreements to apply only to operator trainees. The Company in its motion for a re-hearing argues that no employee who is working for another company as an operator, such as Shell, Ethyl, Allied, Dow or any other company

can be considered as a first class operator at Formosa's chemical plant because the products, procedures and processes are entirely different. This is a fact which must be proven by the evidence. No such evidence was offered at the hearing on April 17, 1991.

It is the Arbitrator's opinion that he has no authority to allow evidence or listen to argument regarding a fact that was not proven at the hearing. Since there is no claim that such evidence was unavailable to the Company at the hearing, the request for a re-hearing is denied at Formosa's costs.

July 10, 1991

JOHN J. MAXWELL - Arbitrator

ARBITRATION

Between

Formosa Plastics Corporation

and

General Truck Drivers, Warehousemen
and Helpers Union NO. 5

Grievance of Thomas W. Loper

FMCS Case No. 90-20772

Hearing, April 17, 1991
Formosa Administrative Office
Baton Rouge, Louisiana

JOHN J. MAXWELL
Impartial Arbitrator

This matter was heard on April 17, 1991 at the administration building of Formosa Plastics in Baton Rouge, Louisiana.

Present:
Randall G. Wells, Attorney for the Union
Murphy J. Foster, III, Attorney for the Company
Mr. Don McLean, Union President
Mr. Thomas W. Loper, Grievant
Mr. Patrick Loupe, Company Representative

The arbitrator has carefully examined the testimony of witnesses, the exhibits and the briefs of Counsel.

ISSUE

Has the Company violated the wage provisions of the collective bargaining agreement in force between the Company and Union by failing to pay Thomas W. Loper first class operator's pay when he

was hired? If so what shall be the remedy?

LABOR AGREEMENT

BATON ROUGE PLANT
HOURLY LABOR RATE SCHEDULE

I. Process Operations

	10/6/89 .45/hr	10/6/90 .46/hr	10/6/91 .46/hr
Utility Operator	$15.23	$15.69	$16.15
Operator 1-C	$14.66	$15.12	$15.58
Operator 2-C	$14.09	$14.55	$15.01
Operator 3-C	$13.39	$13.85	$14.31

II. Maintenance

Mechanic 1-C	$15.23	$15.69	$16.15
Machinist 1-C	$15.23	$15.69	$16.15
Boiler Shop 1-C	$15.23	$15.69	$16.15
Welder 1-C	$15.23	$15.69	$16.15
CPIM 1-C	$15.23	$15.69	$16.15
Instrument 1-C	$15.23	$15.69	$16.15

Transportation 1-C
$15.23 $15.69 $16.15
Garage Mechanic 1-C
$15.23 $15.69 $16.15

III. Miscellaneous

Chemical Routine IC
$14.66 $15.12 $15.58

IV. Progressive System

Hire
$ 8.00 $ 8.00 $ 8.00
1 month
$ 9.20 $ 9.66 $10.12
3 month
$10.20 $10.66 $11.12
4 month
$11.20 $11.66 $12.12
12 month
$12.20 $12.66 $13.12
24 month
$13.20 $13.66 $14.12
36 month
$14.20 $14.66 $15.12
48 month
Top Rate Top Rate Top Rate

FACTS

Thomas Loper, hereinafter called Grievant, was hired by Formosa Plastics, hereinafter called Company, in or about January 18, 1988, as an operator trainee in accordance with the Baton Rouge Plant

Hourly Rate Schedule for Employees Hired After October 1, 1986, as set out in the Labor Agreement marked Joint Exhibit One.

On October 1, 1989, the Company and the Union entered into a new Labor Agreement extending to September 30, 1992 (marked Joint Exhibit Two). On page 55 of said agreement there appears the Baton Rouge Plant Hourly Labor Rate Schedule as set out above.

On May 21, 1990 the Grievant, through the Union, filed this grievance seeking a pay increase. The Union evidence shows that in 1985 the Company employed six (6) process operators who worked at first class operator positions in local area plants. These operators began their employment with the Company at the first class operator level of

pay, responsibilities and duties.

The Grievant worked approximately 30 years as a first class operator in the Ethyl Corporation. When Ethyl closed, he worked for J. E. Merit Company inside the Formosa plant loading railroad tank cars. Loper was hired to perform the same loading operation he had performed as a Merit employee. He was hired to replace a first class operator who retired. His pay started at $8.00 per hour in accordance with Joint Exhibit 2 page 55. After a short orientation period, he continuously performed first class operator's work, but was not paid first class operator's wages. The grievant contends that since he had all the qualifications of a first class operator when he was hired "off of the street" he should receive the same

pay as other first class operators hired "off of the street" and particularly those six operators hired in 1985.

The Union also contends that maintenance men and other specialized classifications were hired by the Company at first class wages after 1986 and were not required to start work at the wages set out under the Progressive System on pages 53 and 55 of the two Labor Agreements. The Contention is that to hire maintenance and other specialized skilled workers who are already first class workers when they are hired and to pay them accordingly, but to hire first class operators and pay them under the progressive system violates the collective bargaining agreement in force an effect between the parties.

CONCLUSIONS

Thomas W. Loper was a first class skilled operator at the time he was hired by the Company. In 1985 six (6) first class operators were hired at first class pay. The Company has consistently hired first class maintenance men and other first class workers from "off of the street" and paid them first class wages. From the evidence, it appears that first class pay for first class work was the past practice of the Company.

The Company contends that in the 1986 agreement the hourly rate schedule at the bottom of page 53 and the 1989 Section IV Progressive System at the bottom of page 55 of the Labor Agreement pertain only to all operators in the plant. We find nothing in this section

which would limit its application only to the operators hired by the Company. We find nothing in this section which would limit first class operators from receiving first class pay. We find nothing in this section of the Contract which say it does not apply to the first class operators classifications. We find the contested language very vague and ambiguous and must look to equity to answer the dilemma.

Considering all of the evidence presented at the hearing we state the question to be answered as follows: Is is discrimination to pay newly hired, proven first class workers in some classifications first class wages for that classification (maintenance) and deny to proven first class workers of another classification (operator) first

class wages and require him to pass through a progressive wage system covering 48 months in order to receive first class wages?

This arbitrator answers that question in the affirmative. There is no doubt that when the Company hired the Grievant he was a first class operator. The past practice of the Company at the time he was hired (January 18, 1988) was to hire first class operators at first class pay and he should have been hired at that rate of pay. But, he was not. It was not until May 21, 1990 when first class maintenance men and other first class classifications were hired at first class pay that it was realized that there was discrimination against Loper and thus this grievance

There is nothing in either the

hourly rate schedule at the bottom of page 53 of the 1986 Agreement or in Section IV of the 1989 Agreement which indicates other than that a party who is a first class operator when he is hired should receive first class operator's pay. This was the past practice when the Grievant was hired and he should have received same. However, the Union asks only that Loper receive first class operator's pay from the date of filing (May 21, 1990) to date. The request is granted.

For the reasons assigned, the Grievance of Thomas W. Loper is maintained.

June 6, 1991

JOHN J. MAXWELL
Impartial Arbitrator